ranchers face great uncertainty in determining whether "wetlands" on their property are subject to CWA section 404 and whether their activities might constitute a regulated "addition" of "dredged or fill material." Farm Bureau Brief 1-3. In addition, as described below, members of *amici* organizations engage in a wide range of agricultural and land management activities that have been swept into the scope of the CWA section 402 prohibition by the government's overbroad interpretation of "navigable waters." Our members, for example, have been informed by EPA, or have faced citizen litigant allegations, that the following activities involve pollutant discharges to "navigable waters":

1. **Application of fertilizer to cropland, where the fields contain wet areas with any remote hydrological connection to any navigable waters.**

Regulated pollutant discharges have been alleged where, for example, operators of swine farms irrigate cropland containing low, wet areas characterized as "wetlands" or "playa lakes." Swine producers often irrigate fields with treated wastewater from their operations, to make beneficial use of the nutrient content of animal waste for crop production. Even swine producers located in the arid Oklahoma panhandle - miles from any navigable water - have been ordered not to apply treated wastewater to these apparently isolated "wetlands" or "playa lakes." "Navigable water" status has sometimes been predicated on nothing more than a perceived "hydrological connection" via groundwater, based on

the potential for infiltration of water from these low areas into groundwater, which in turn might flow miles toward eventual recharge to a navigable surface water. Alternatively, as in these consolidated cases, "navigable water" status of these wet areas can be predicated on their proximity and potential surface hydrological connection to a ditch or drainage way that, in turn, ultimately connects to any series of channels that lead to a navigable water.

2. **Stormwater runoff from animal confinement areas that reaches a ditch or drainage way with any remote hydrological connection to any navigable water.**

Allegations of unlawful "stormwater discharges" have been asserted against dairy farms in a desert region of Eastern New Mexico located miles from any navigable water. These farms have faced CWA enforcement actions where stormwater containment measures temporarily failed, allowing runoff to reach a roadside ditch. Even if the runoff was confined to the roadside ditch itself and had no reasonable potential to reach a navigable-in-fact water, EPA and citizen litigants maintain that such discharges violate the CWA if the ditch ultimately connects to other ditches that eventually connect to any stream or other tributary of a navigable water, no matter how distant.

3. **Spills (of any size) of animal manure that reach a ditch or drainage way with any remote hydrological connection to any navigable water.**

Even in the arid West, far from any navigable water, small on-site spills of animal manure have triggered CWA enforcement actions. Such proceedings generally involve accidental dry-weather spills where animal waste enters a dry roadside ditch or other drainage feature. Typically, the spill itself would have been cleaned up by removing the animal waste before any surface water actually flowed in the ditch. Yet, so long as EPA staff or citizen litigants can identify a ditch or drainage feature affected by a spill and can point to any remote hydrological connection to navigable waters, they can allege an illegal discharge to "navigable waters."

4. **Construction of farm buildings, animal housing, feedlots, farm roads, irrigation ditches, etc., where stormwater runoff from these areas may reach a ditch or drainage way with any remote hydrological connection to any navigable waters.**

Although stormwater discharges from many agricultural activities are "agricultural stormwater discharges" excluded from CWA regulation by statute, *see* 33 U.S.C. § 1362(14), EPA views the construction of farm buildings and other agricultural structures or facilities to be "construction activities" from which stormwater discharges are subject to regulation under CWA section 402(p). *See id.* § 1342(p) and 40 C.F.R. § 122.26(b)(14)(x), (b)(15) (2005). For this reason,

agricultural operations have faced allegations of CWA liability where they have built structures on their lands without first obtaining authorization under a CWA stormwater discharge permit. As with the examples described above, permitting requirements and liability for unauthorized discharges have been alleged even for building in the most arid regions of New Mexico, Texas, and Oklahoma - miles from any navigable water - provided only that there is some ditch to which stormwater runoff might flow and some plausible, if tenuous and indirect, connection between the ditch and any navigable water.

5. Aerial application or aerial drift of pest control products to areas containing wetlands, ditches, or drainages with any remote hydrological connection to any navigable waters.

EPA's interpretation of whether, and under what circumstances, beneficial pest control products may be "pollutants" for purposes of CWA regulation has been evolving in recent years. *See Application of Pesticides to Waters of the United States in Compliance with FIFRA*, Proposed Rulemaking and Notice of Interpretive Statement, 70 Fed. Reg. 5093 (Feb. 1, 2005). Citizens groups have alleged, however, that the aerial application or aerial drift of terrestrial pesticides constitutes a CWA discharge of a pollutant if any portion of the product enters "navigable waters." Thus, under the government's interpretation of that term, crop protection activities - and even mosquito-control spraying along city and suburban streets - may constitute a regulated CWA discharge if pesticide

enters any ditch or drainage feature remotely connected to navigable waters.

* * *

In none of these situations is it deemed relevant whether the pollutant discharge has reached, or could ever affect, the navigable-in-fact water that is purportedly the object of the CWA's protective regulatory scheme. Instead, any ditch, drainage way, or low spot itself is deemed to be a "navigable water" - subject to the full breadth of CWA prohibitions and sanctions - based on any hydrological connection, no matter how ephemeral or remote, to a navigable-in-fact water. Because most ditches and drainages flow *somewhere* after a heavy rain, in the government's view virtually any discharge of any "pollutant" to any ditch, drainage way, or low spot may be regulated.

II. THE CLEAN WATER ACT CANNOT REASONABLY BE INTERPRETED TO AUTHORIZE THE REGULATION OF DISCHARGES TO EACH AND EVERY WETLAND, DITCH, OR DRAINAGE WAY WITH ANY "HYDROLOGICAL CONNECTION" TO A NAVIGABLE WATER.

As observed by this Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers ("SWANCC")*, Congress plainly sought in the CWA to preserve State and local power over the regulation of land use. 531 U.S. 159, 174 (2001); *see* 33 U.S.C. § 1251(b) (describing statutory goal to "recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the

development and use . . . of land and water resources . . . ."). Given this explicit design - along with the equally plain focus on waters that are, have been, or could be navigable in fact (*see SWANCC*, 531 U.S. at 172; Farm Bureau Brief 7-10) - the CWA cannot reasonably be stretched to authorize federal regulatory authority over any activity, anywhere, that results in the deposition of any pollutant into virtually any ditch, drainage way, or wetland. That is precisely the result, however, where "navigable water" status arises from nothing more than a mere "hydrological connection" to a navigable-in-fact water.

As demonstrated in these examples, in addition to several judicial decisions in line with the rulings under review here,[2] an ordinary roadside ditch - even one that is typically dry and far from any open water - can be deemed a "tributary" and therefore a "navigable water" by virtue of its "hydrological connection," no matter how remote, to navigable-in-fact waters.[3] The result is that common agricultural and land use activities - crop and livestock production, construction, and pest control - are subject to severe sanctions and federal regulation if they cause the deposition of "pollutants" into virtually any roadside ditch. Setting

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[2] *See, e.g., United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005), *petition for cert. filed* Nov. 11, 2005 (No. 05-623); *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004).

[3] As explained in the brief of *amicus curiae* National Association of Home Builders (at 13-16) the term "open water" is synonymous with navigable-in-fact water.

aside whether such sweeping regulatory power would be within the scope of Congress's authority over the channels of commerce, it strays far beyond what Congress sought to impose for the protection of "navigable waters" of the United States.

III. "NAVIGABLE WATERS" ARE PROPERLY LIMITED TO WATERS THAT ARE (OR COULD BE) NAVIGABLE OR THAT ABUT AND ARE "INSEPARABLY BOUND UP" WITH SUCH NAVIGABLE-IN-FACT WATERS.

The court below, the Corps of Engineers, and EPA have misconstrued this Court's references in *SWANCC* to a "significant nexus" with navigable waters, 531 U.S. at 167, and in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985), to include the movement of water in "hydrologic cycles." *See* Pet. App. A21 (Sixth Circuit *Rapanos* ruling that nonnavigable waters, to be deemed "navigable waters," must have a "hydrological connection or some other 'significant nexus' to traditional navigable waters"). As any fair reading of *SWANCC* and *Riverside Bayview* makes plain, "navigable water" status requires far more than a mere "hydrological connection" to navigable-in-fact waters. Indeed, if Congress's focus on the protection of "navigable waters" is to have any effect at all, as required under *SWANCC*, 531 U.S. at 172, then the CWA must target "waters" (as contrasted with land features such as ditches) that are (or could be) navigable-in-fact or that abut and are "inseparably bound up" with navigable-in-fact waters.

In *SWANCC*, the Court reiterated its *Riverside Bayview* reasoning that the Corps could reasonably regulate wetlands *adjacent* to navigable waters because they had been found by the Corps to be "waters" that are "inseparably bound up" with the navigable waters. 531 U.S. at 167 Regulation of nonnavigable waters "inseparably bound up" with the navigable waters was, in the Court's view, consistent with Congress's intent to protect the "aquatic ecosystem" of the navigable waters. *Id.*; *see Riverside Bayview*, 474 U.S. at 133-34 (discussing Corps' finding that wetlands adjacent to navigable-in-fact waters generally play a key role in protecting and enhancing the quality of those waters). The Court thus confirmed in *SWANCC* its prior finding that CWA jurisdiction encompasses "nonnavigable wetlands adjacent to open waters," but emphatically declined to extend it to nonnavigable waters (in *SWANCC*, ponds) that are *not* "adjacent to open water" and therefore generally need *not* be protected to preserve the "aquatic ecosystem" of the navigable-in-fact waters. 531 U.S. at 167-68, 172.

Similarly here, the Court should decline the invitation to extend CWA "navigable water" protection to nonnavigable waters (here, wetlands) that merely abut *other* nonnavigable surface features (here, ditches and drains, which are not "waters" at all), which in turn connect directly or indirectly to navigable-in-fact waters. Whether the wetlands at issue are connected by surface flow to ditches and drains (as in *Rapanos*) – or whether those wetlands are adjacent to but do not exchange surface flow with ditches and drains (as in *Carabell*) – these wetlands are plainly not adjacent to *or* "inseparably bound up" with any navigable-in-fact

water. The regulation of discharges to such nonnavigable features, which are only remotely "connected" to navigable-in-fact waters, cannot rationally be grounded in Congress's goal of protecting the navigable waters.

IV. THE INTERPRETATION OF "NAVIGABLE WATERS" MUST PROVIDE FAIR WARNING TO FARMERS AND OTHER ORDINARY PEOPLE THAT THEIR CONDUCT COULD VIOLATE THE CLEAN WATER ACT.

"Words which are vague and fluid may be as much of a trap for the innocent as the ancient laws of Caligula." *United States v. Cardiff*, 344 U.S. 174, 176 (1952). To avoid such a trap, the terms "navigable waters" and "waters of the United States" must be interpreted in terms that are sufficiently definite to provide "fair warning" to ordinary persons as to whether their conduct violates the CWA. *Id.* In addition, statutes must be construed "so as to avoid a danger of unconstitutionality." *United States v. Harriss*, 347 U.S. 612, 618 (1954).

The Corps' (and EPA's) regulation interprets "navigable waters" to include not only navigable-in-fact waters, but also "tributaries" to such waters, as well as wetlands "adjacent" to "tributaries" to navigable-in-fact waters. This interpretation – particularly given the breadth of the government's view of "tributaries" – violates the constitutional requirement of definiteness because it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The

underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.* at 617.

As demonstrated in these consolidated cases and in the examples described in Section I above, the government's interpretation of "tributaries" sweeps in every ditch or "drain" (and presumably every swale, gully, or draw) that after a storm may contain water, which in turn may enter a chain of other nonnavigable, intermittently flowing geographic features toward an ultimate connection with a navigable-in-fact water. No such formulation can be meaningfully applied by farmers or other landowners who may be many miles and many ditches removed from any actual navigable waterways.

It is unreasonable to require a landowner either to guess or to retain an expert hydrologist to determine whether roadside ditches, natural swales, or other drainage features on or near his property constitute "tributaries" to navigable waters by virtue of remote, ephemeral surface water connections. Put differently, no landowner should have to hire a hydrologist to determine whether common farming and land management activities are subject to regulation. Yet that is precisely what is required to determine whether the Corps' and EPA's "navigable waters" definition applies to ordinary ditches, drains, and other geographic features of the sort deemed here to be "tributaries." While the United States has been more than willing to initiate CWA enforcement actions on the basis of such fluid and ill-defined terms, "the vagueness doctrine bars enforcement of a statute which

either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (internal quotations omitted).

To satisfy the constitutional requirement for definiteness and avoid the "vice of vagueness," *Cardiff*, 344 U.S. at 176, the terms "navigable waters" and "waters of the United States" must be defined so as to provide "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible *the line should be clear.*" *Id.* at 265 (emphasis added) (internal quotations omitted). If, as this Court has held, CWA jurisdiction is limited to navigable-in-fact waters and waters that abut and are "inseparably bound up" with such navigable-in-fact waters, then the regulating agencies to whom Congress delegated interpretive power must clearly define these terms in a way a person of common intelligence can understand. Wherever the boundary lies, it should involve some apparent physical characteristics of "water" (as opposed to any ditch, drainage way, or draw) and some reasonably apparent proximity to and connection with navigable-in-fact waters. The current definition falls far short of this requirement and is therefore unlawful.

CONCLUSION

The judgments of the Sixth Circuit should be reversed.

Respectfully submitted,

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JOHN A. RAPANOS, *et ux.*, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, *et al.*,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF JARED M. DIAMOND, PAUL R. EHRLICH, HAROLD A. MOONEY, GORDON H. ORIANS, STUART L. PIMM, SONDRA POSTEL, PETER H. RAVEN, JOHN W. TERBORGH, DAVID S. WILCOVE, AND EDWARD O. WILSON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici are prominent scientists in the fields of biology, botany, zoology, entomology, and ecology.[1] They have special knowledge of the important nexus of tributaries and adjacent wetlands to downstream water bodies and aquatic ecosystems, and other issues before this Court. Their scientific expertise enables them to explain the economic and ecological consequences of polluting or filling wetlands and tributaries, including the resulting loss of ecosystem functions, wildlife habitat, and biodiversity. Understanding these impacts is necessary to appreciate fully the substantial effects of altering wetlands and tributaries on interstate commerce, and why, under the Court's jurisprudence, Congress is empowered to regulate such activities.

Amici include, in alphabetical order:

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus* briefs and have filed letters of consent with the Clerk of the Court.

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